A

LIM HOOI TEIK v. LEE LAI CHENG (AS NEXT OF KIN TO LEE CHEE ZHENG AND ON HER BEHALF)

COURT OF APPEAL, PUTRAJAYA
ABDUL AZIZ ABDUL RAHIM JCA
HAMID SULTAN ABU BACKER JCA
B VERNON ONG LAM KIAT JCA
[CIVIL APPEAL NO: P-02-134-01-2013]
19 OCTOBER 2015

C ***CIVIL PROCEDURE:*** *Summary disposal of order – Rules of Court 2012, O. 14A – Disposal of case on point of law – Defendant ordered to undergo DNA test to determine paternity of minor – Plaintiff's claim of having intimate relationship with defendant – Whether proved – Whether prima facie case had been made out – Whether High Court Judge exercised discretion before proceeding to determine questions of law – Whether appropriate case for disposal of action without full trial*

D ***WORDS & PHRASES:*** *'may' – Rules of Court 2012, O. 14A – Implication of – Whether court had discretion to dispose case without full trial*

The plaintiff, the natural mother of one Lim Chee Zheng ('the minor'), claimed for, *inter alia*, an order that the defendant undergo a DNA test to E determine the paternity of the minor. It was the plaintiff's allegation that she had an intimate relationship with the defendant and that the defendant was the father of the minor. The defendant, however, denied the relationship and refused to undergo a DNA test. The High Court ordered the defendant to undergo a DNA test in order to determine the paternity of the minor. The F decision of the High Court Judge was made upon the determination of two questions of law without a full trial of the action pursuant to O. 14A of the Rules of Court 2012 ('ROC 2012'). Hence, this appeal.

Held (allowing appeal)
Per Vernon Ong Lam Kiat JCA delivering the judgment of the court:

G **(1)** Order 14A of the ROC 2012 provides that the court may, upon the application of a party or on its own motion, determine any question of law where such question is suitable for determination without a full trial of the action. As the word 'may' implies, the court has a discretion whether or not to dispose the case without full trial; in short, the O. 14A H procedure does not necessarily apply automatically. Accordingly, the court must exercise its discretion in deciding whether or not to dispose of the case upon the determination of any question of law. (paras 21 & 22)

(2) The plaintiff's claim that there was an intimate relationship remained to I be proved. As such, it was still a fact in issue. Even if it was assumed that there was a relationship between the parties, it does not necessarily follow that the defendant knew that he was the father of the minor.

It would be a matter of conjecture to hold accordingly. The plaintiff ought to have produced evidence to prove that fact of the relationship as pleaded; and that such relationship once proven would warrant the making of an order to compel the defendant to undergo a DNA test for the purpose of determining the paternity of the minor. (paras 25 & 26)

(3) This was not an appropriate case for the disposal of the action on a point of law without a full trial of the action. Before an order could be made to compel the defendant to undergo a DNA test to determine the paternity of a minor, the plaintiff must have made out a *prima facie* case against the defendant. The High Court Judge did not appear to have exercised his discretion before proceeding to determine the questions of law. (paras 23 & 27)

Bahasa Malaysia *Headnotes*

Plaintif, ibu kandung kepada Lim Chee Zheng ('kanak-kanak'), menuntut, antara lain, suatu perintah untuk defendan menjalani ujian DNA bagi menentukan paterniti kanak-kanak. Adalah dakwaan plaintif bahawa dia melakukan hubungan intim dengan defendan dan defendan adalah bapa kepada kanak-kanak. Defendan menafikan hubungan tersebut dan enggan menjalani ujian DNA. Mahkamah Tinggi, walau bagaimanapun, mengarahkan defendan menjalani ujian DNA bagi menentukan paterniti kanak-kanak. Keputusan Mahkamah Tinggi dibuat berdasarkan penetapan dua persoalan undang-undang tanpa perbicaraan penuh menurut A. 14A Kaedah-Kaedah Mahkamah 2012 ('KKM 2012'). Oleh itu, rayuan ini.

Diputuskan (membenarkan rayuan)
Oleh Vernon Ong Lam Kiat HMR menyampaikan penghakiman mahkamah:

(1) Aturan 14A Kaedah-Kaedah Mahkamah 2012 memperuntukkan bahawa mahkamah boleh, atas permohonan pihak terlibat atau atas kehendaknya sendiri, menentukan apa sahaja persoalan undang-undang di mana soalan berikut sesuai untuk penentuan tanpa perbicaraan penuh tindakan tersebut. Seperti perkataan 'boleh' digunakan, mahkamah mempunyai budi bicara sama ada atau tidak melupuskan kes tanpa perbicaraan penuh; secara ringkasnya, prosedur A. 14A tidak semestinya diguna pakai secara automatik. Oleh itu, mahkamah mestilah menggunakan budi bicara dalam menentukan sama ada mahu atau tidak melupuskan kes menurut penentuan mana-mana persoalan undang-undang

(2) Dakwaan plaintif bahawa terdapat hubungan intim masih belum dibuktikan. Dengan itu, ia masih suatu isu. Walaupun diandaikan adanya hubungan intim antara pihak-pihak yang terlibat, tidak semestinya defendan mempunyai pengetahuan bahawa dia adalah ayah kepada kanak-kanak. Ia hanyalah tekaan untuk mengatakan sedemikian.

A Plaintif perlu mengemukakan keterangan untuk membuktikan fakta hubungan tersebut seperti yang diplidkan, dan hubungan tersebut apabila dibuktikan akan mewajarkan pembuatan suatu perintah memaksa defendan menjalani ujian DNA untuk tujuan menentukan paterniti kanak kanak.

B **(3)** Ini bukanlah kes yang sesuai untuk melupuskan tindakan berdasarkan persoalan undang-undang tanpa perbicaraan penuh tindakan tersebut. Sebelum perintah dibuat untuk memaksa defendan menjalani ujian DNA bagi menentukan paterniti kanak kanak, plaintif mesti terlebih dahulu membuktikan kes *prima facie* terhadap defendan. Hakim Mahkamah C Tinggi seolah-olah tidak menggunakan budi bicara sebelum menentukan persoalan undang-undang.

Case(s) referred to:
Juahir Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johor [1996] 4 CLJ 1 CA ***(refd)***
Lai Meng v. Toh Chew Lian [2012] 10 CLJ 479 HC ***(refd)***
D *Lau Zhan Chen (an infant by his mother and next friend Lau Fatt Wan (f)) v. Makoto Togase & 2 Ors [1995] 1 CLJ 841 HC* ***(refd)***
Lionel Lau Siang Kok v. Datuk Seri Panglima Lau Chon Kun [2013] 1 CLJ 619 CA ***(refd)***
Noorfadilla Ahmad Saikin v. Chayed Basirun & Ors [2012] 1 CLJ 769 HC ***(refd)***
Peter James Binsted v. Jevencia Autor Partosa [2000] 2 CLJ 906 HC ***(dist)***
E *Tan Kim Khuan v. Tan Kee Kiat (M) Sdn Bhd [1998] 1 CLJ (Supp) 147 HC* ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 101, 103, 106
Federal Constitution, arts. 8(1), (2)
Rules of Court 2012, O. 14A
F United Nations Convention on the Rights of the Child [UK], arts. 3, 7

For the appellant - Tan Kah Hoo; M/s Gan Teik Chee & Ho
For the respondent - Malik Imtiaz Sarwar (Tharumarajah Thiagarajan & Pavan Deep Singh with him); M/s T Tharuma & Assocs

G *[Editor's note: For the High Court judgment, please see Lee Lai Ching v. Lim Hooi Teik [2013] 4 CLJ 107 (overruled).]*

Reported by Suhainah Wahiduddin

H **JUDGMENT**

Vernon Ong Lam Kiat JCA:

Introduction

[1] This is the defendant's appeal against the decision of the High Court I ordering the defendant to undergo a DNA test in order to determine the paternity of a minor.

[2] The decision of the learned judge was made upon the determination of two questions of law without the full trial of the action pursuant to O. 14A of the Rules of Court 2012 (ROC 2012). In this judgment, the parties shall be referred to as they were in the court below.

Brief Account Of The Salient Facts

[3] The plaintiff is the natural mother of one Lim Chee Zheng ("the minor"). She claims that she had an intimate relationship with the defendant and that the defendant is the father of the minor. The plaintiff's claim is, *inter alia*, for maintenance for herself and for the minor, an order that the defendant undergo a DNA test to determine the paternity of the minor and a declaration that the minor is the defendant's son.

[4] The defendant has denied the relationship and being alleged as the father of the minor; he refused to undergo a DNA test to confirm the minor's paternity.

[5] Both parties agreed that the High Court determine the issue whether the defendant has to undergo a DNA test as a question of law.

Findings Of The High Court

[6] The two questions of law which were determined by the learned judge are as follows:

(a) whether the defendant, Lim Hooi Teik, could be compelled to give and/or supply a sample of his blood for a DNA test to determine the paternity of the child by the name of Lim Chee Zheng; and

(b) in the event the answer is yes, such consequential orders be made to enable the defendant to give such specimens required by the relevant hospital.

[7] In regard to question (a), the learned judge held that a DNA test would determine the paternity of the minor (*Lau Zhan Chen (an infant by his mother and next friend Lau Fatt Wan (f)) v. Makoto Togase & Ors* [1995] 1 CLJ 841). An order for DNA testing should not be construed as "hurt" as defined in the Penal Code because the *mens rea* or objective behind the DNA test is to determine the paternity of the minor.

[8] The learned judge invoked art. 3 of the United Nations Convention on the Rights of the Child ("UNCRC") and held that the best interest of the minor shall be the primary consideration in determining whether the defendant can be compelled to under a DNA test (*Lai Meng v. Toh Chew Lian* [2012] 10 CLJ 479; [2012] 8 MLJ 180; *Noorfadilla Ahmad Saikin v. Chayed Basirun & Ors* [2012] 1 CLJ 769; [2012] 1 MLJ 832).

[9] The learned judge also invoked arts. 8(1) and (2) of the Federal Constitution and art. 7 of the UNCRC in holding that the minor is entitled to the equal protection of the law and has a right to know who his biological father is.

A **Defendant's Submission**

[10] Learned counsel's appeal is premised on five main grounds.

[11] Firstly, the Deoxyribonucleic Acid (DNA) Identification Act 2009 (DNA Act) only applies to three categories of persons and with the prior
B written consent.

[12] Second, the learned judge should have followed the Court of Appeal decision in *Lionel Lau Siang Kok v. Datuk Seri Panglima Lau Chon Kun* [2013] 1 CLJ 619; [2013] 2 MLJ 889 (CA) which held that there is no common law rule that empowers the court to order a party to submit himself to a DNA
C test (*Peter James Binsted v. Jevencia Autor Partosa* [2000] 2 CLJ 906; [2000] 2 MLJ 569).

[13] Third, the plaintiff did not provide any evidence to prove the alleged intimate relationship as required under ss. 101 and 103 of the Evidence Act 1950 (*Tan Kim Khuan v. Tan Kee Kiat (M) Sdn Bhd* [1998] 1 CLJ (Supp) 147;
D [1998] 1 MLJ 697, 706; *Juahir Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 4 CLJ 1; [1996] 3 MLJ 627, 635 (CA)). As such, there is no basis for the learned judge to make the order.

[14] Fourth, learned counsel also referred to the notes of proceedings to support his argument that the learned judge applied his moral views on what
E the law should be (RRT(1) at p. 1).

[15] Lastly, learned counsel submitted that the UNCRC has no application to the case. Article 8 of the Federal Constitution also has no application to the case.

F **Plaintiff's Submission**

[16] Learned counsel argued that the O. 14A procedure is premised on the primary facts relating to the relationship which were taken as agreed between the parties.

G **[17]** Since the fact of whether the defendant is the father of the minor is within the knowledge of the defendant, the burden of proof is on the defendant to prove that he is not the father of the minor. Therefore, the only way of proving that he is not the father of the minor is for the defendant to undergo a DNA test (s. 106 of the Evidence Act 1950).

H **[18]** The decision of the High Court in *Peter James Binsted v. Jevencia Autor Partosa* (*supra*) is distinguishable as it is no longer necessary to take a blood, tissue or bone specimen; it is sufficient for a swab to be taken of the mouth for that purpose. At any rate, the order of the High Court did not require the defendant to give a blood specimen. As such, there is no hurt that will be
I suffered by the defendant.

[19] The decision of the learned judge is sound and safe and is within the framework of the Federal Constitution and the Child Act 2001. The Child Act 2001 was enacted after the UNCRC and it provides safeguards for children without distinguishing between legitimate and illegitimate children. In making the order, the learned judge upheld the minor's right to dignity, the right to know one's parent.

Decision

[20] In our considered view, the principal issue is whether in the circumstances, it was appropriate for the learned judge to adopt the procedure under O. 14A ROC 2012 and to dispose the case without a full trial.

[21] Order 14A ROC 2012 provides that the court may, upon the application of a party or on its own motion, determine any question of law where such question is suitable for determination without the full trial of the action. As the word "may" implies, the court has a discretion whether or not to dispose the case without full trial; in short, the O. 14A procedure does not necessarily apply automatically.

[22] Accordingly, the court must exercise its discretion in deciding whether or not to dispose of the case upon the determination of any question of law. In considering whether to exercise its discretion, the court should consider the nature of the claim, the defence and the facts and law in issue. In other words, whether or not the court should dispose the case on a point of law is a matter of discretion and which discretion should be exercised judicially.

[23] On the consideration of the facts and issues in issue as disclosed in the pleadings, we do not think that this is an appropriate case for the disposal of the action on a point of law without the full trial of the action. We take the view that before an order can be made to compel a defendant to under a DNA test to determine the paternity of a minor, the plaintiff must have made out a *prima facie* case against the defendant.

[24] In this case, the defendant denies the plaintiff's allegation that she and the defendant were in an intimate relationship for nine years and that the minor was conceived. Accordingly, the submission of learned counsel for the plaintiff that the primary facts relating to the relationship between the plaintiff and the defendant had been taken as agreed is without merit.

[25] In the circumstances, the plaintiff's claim that there was an intimate relationship remains to be proved; as such it is still a fact in issue. Even if it is assumed that there was a relationship between the parties, does it necessarily follow that the defendant knows that he is the father of the minor. In our considered opinion, it would be a matter of conjecture to hold accordingly. At any rate, it is a matter of evidence to be led to show that the defendant knows of that fact, if at all.

A **[26]** We take the view that at the very least, the plaintiff ought to have produced evidence to prove that fact of the relationship as pleaded; and that such relationship once proven would warrant the making of an order to compel the defendant to undergo a DNA test for the purpose of determining the paternity of the minor.

B **[27]** We have carefully scrutinised the appeal record. The learned judge did not appear to have exercised his discretion before proceeding to determine the questions of law. This finding is borne out by the judgment which indicates that after a recitation of the brief facts, the learned judge proceed to consider the questions of law.

C **[28]** For the foregoing reasons, we allowed the appeal. The decision of the High Court is set aside. The case is remitted to the High Court to be determined at a full trial of the action.

D

E

F

G

H

I